

1 KING, HOLMES, PATERNO & BERLINER, LLP
HOWARD E. KING, ESQ., STATE BAR NO. 77012
2 STEPHEN D. ROTHSCHILD, ESQ., STATE BAR NO. 132514
ROTHSCHILD@KHPBLAW.COM
3 SETH MILLER, ESQ., STATE BAR NO. 175130
MILLER@KHPBLAW.COM
4 1900 AVENUE OF THE STARS, 25TH FLOOR
LOS ANGELES, CALIFORNIA 90067-4506
5 TELEPHONE: (310) 282-8989
FACSIMILE: (310) 282-8903

6
7 Attorneys for Plaintiffs and Counter-
Defendants PHARRELL WILLIAMS,
ROBIN THICKE and CLIFFORD
8 HARRIS, JR. and Counter-Defendants
MORE WATER FROM NAZARETH
9 PUBLISHING, INC., PAULA MAXINE
PATTON individually and d/b/a
10 HADDINGTON MUSIC, STAR TRAK
ENTERTAINMENT, GEFEN
11 RECORDS, INTERSCOPE RECORDS,
UMG RECORDINGS, INC., and
12 UNIVERSAL MUSIC DISTRIBUTION

13 UNITED STATES DISTRICT COURT

14 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

15 PHARRELL WILLIAMS, an
individual; ROBIN THICKE, an
16 individual; and CLIFFORD HARRIS,
JR., an individual,

17 Plaintiffs,

18 vs.

19 BRIDGEPORT MUSIC, INC., a
Michigan corporation; FRANKIE
20 CHRISTIAN GAYE, an individual;
MARVIN GAYE III, an individual;
21 NONA MARVISA GAYE, an
individual; and DOES 1 through 10,
22 inclusive,

23 Defendants.

24
25 AND RELATED COUNTERCLAIMS.
26

CASE NO. CV13-06004-JAK (AGR_x)
Hon. John A. Kronstadt, Ctrm 750

**CORRECTED NOTICE OF
MOTION AND MOTION OF
PHARRELL WILLIAMS, ROBIN
THICKE AND MORE WATER
FROM NAZARETH PUBLISHING,
INC. FOR JUDGMENT AS A
MATTER OF LAW,
DECLARATORY RELIEF, A NEW
TRIAL, OR REMITTITUR;**

**MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: June 29, 2015
Time: 8:30 a.m.
Ctrm.: 750

Action Commenced: August 15, 2013
Trial Date: February 24, 2015

27 ///

28 ///

1
2
3 **NOTICE OF MOTION**

4 TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

5 PLEASE TAKE NOTICE that, on **June 29, 2015**, at **8:30 a.m.**, or as soon
6 thereafter as the matter may be heard in Courtroom 750 of the above-entitled court,
7 located at 255 East Temple Street, Los Angeles, California 90012, plaintiffs and
8 counter-defendants PHARRELL WILLIAMS and ROBIN THICKE, individually
9 and d/b/a I LIKE 'EM THICKE MUSIC, and counter-defendant MORE WATER
10 FROM NAZARETH PUBLISHING, INC. (collectively, "Counter-Defendants"),
11 will and hereby do move for judgment as a matter of law under Federal Rule of
12 Civil Procedure 50(b) and for declaratory relief, or, alternatively, a new trial under
13 Federal Rule of Civil Procedure 59(a), with regard to the first claim for relief in the
14 respective counterclaims filed by counter-claimants NONA MARVISA GAYE,
15 FRANKIE CHRISTIAN GAYE, and MARVIN GAYE III (collectively, "Counter-
16 Claimants"), for alleged copyright infringement of "Got to Give It Up" by "Blurred
17 Lines," or for a remittitur of the profits awarded to Counter-Claimants.¹

18 The grounds for this motion are that the jury's verdict finding that Counter-
19 Defendants infringed "Got to Give It Up" and the damages and profits awarded by
20 the jury are unsupported by any evidence, let alone substantial evidence, and are
21 contrary to law; and evidentiary errors and legal errors in the jury instructions were
22 prejudicial and prevented Counter-Defendants from receiving a fair trial.

23 This motion is based on this Notice of Motion and Motion, the accompanying
24 Memorandum of Points and Authorities, the Declaration of Seth Miller and exhibits
25 thereto filed previously, the Court's files and records in this action, and such other
26 evidence, argument, or other matter as may be presented prior to or at the hearing on
27 the Motion.

28 ¹ This Motion is brought solely on behalf of counter-defendants Williams, Thicke, and More Water From Nazareth. All other counter-defendants prevailed at trial, were found not liable, and do not seek a new trial or any other relief herein.

1 Counter-Defendants are filing the corrected memorandum that follows in
2 excess of the 25-page limit set forth in Local Rule 11-6 in furtherance of the Court's
3 Order Granting in Part Request of Counter-Defendants Pharrell Williams and Robin
4 Thicke for Permission to File Memorandum in Excess of 25 Pages in Support of
5 May 1, 2015, Post-Trial Motions, Dkt. 383.

6
7 DATED: May 11, 2015

KING, HOLMES, PATERNO &
BERLINER, LLP

8

9

10

By: 

11

HOWARD E. KING

12

SETH MILLER

13

Attorneys for Plaintiffs and Counter-Defendants
PHARRELL WILLIAMS, et al.

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

TABLE OF CONTENTS

| | <u>Page</u> |
|----|--|
| 1 | |
| 2 | |
| 3 | |
| 4 | ARGUMENT 1 |
| 5 | I. INSTRUCTIONAL ERRORS MANDATE A NEW TRIAL..... 2 |
| 6 | II. EVIDENTIARY ERRORS MANDATE A NEW TRIAL..... 5 |
| 7 | A. Ms. Finell’s Testimony Was Inadmissible and Prejudicial..... 6 |
| 8 | 1. Testimony About Theme X Was Inadmissible 9 |
| 9 | 2. Testimony About the Keyboard Parts Was Inadmissible 11 |
| 10 | 3. Testimony About the Bass Melody Was Inadmissible 13 |
| 11 | 4. Testimony About the Signature Phrase Was Inadmissible..... 14 |
| 12 | 5. Testimony About Lyrics Was Inadmissible..... 14 |
| 13 | 6. Testimony About Edited and Transcribed Versions of the Sound Recording Was Inadmissible 15 |
| 14 | B. Testimony About the Gayes’ Mash-Ups Was Inadmissible 16 |
| 15 | C. Testimony About Press Statements Was Inadmissible 18 |
| 16 | D. The Court’s Rulings Regarding Evidence of Lay Opinions On Similarity Were Erroneous, Unfair and Prejudicial 19 |
| 17 | E. Nancie Stern’s Opinions About Infringement Were Inadmissible 20 |
| 18 | III. THE EVIDENCE DOES NOT SUPPORT THE INFRINGEMENT |
| 19 | VERDICT 21 |
| 20 | A. The Verdict Is Not Supported By Legally Sufficient Evidence Of Substantial Extrinsic Similarity 22 |
| 21 | B. The Verdict Is Not Supported By Legally Sufficient Evidence Of Substantial Intrinsic Similarity..... 24 |
| 22 | IV. THE EVIDENCE DOES NOT SUPPORT THE DAMAGES |
| 23 | AWARDS 25 |
| 24 | A. The Jury’s Actual Damages Award Is Not Supported By |
| 25 | Evidence 25 |
| 26 | 1. Ms. Stern’s Testimony Should Have Been Excluded..... 25 |
| 27 | 2. Even In Consideration Of Ms. Stern’s Testimony, the Actual Damages Award Is Unsupported By Evidence 26 |
| 28 | |

| | | |
|----|---|----|
| 1 | B. The Jury’s Profits Awards Are Not Supported By Evidence..... | 28 |
| 2 | C. At a Minimum, the Court Should Remit the Profits Awards..... | 30 |
| 3 | CONCLUSION..... | 30 |
| 4 | | |
| 5 | | |
| 6 | | |
| 7 | | |
| 8 | | |
| 9 | | |
| 10 | | |
| 11 | | |
| 12 | | |
| 13 | | |
| 14 | | |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |
| 26 | | |
| 27 | | |
| 28 | | |

TABLE OF AUTHORITIES

| | <u>Page</u> |
|---|---------------------|
| <u>Cases</u> | |
| 1 | |
| 2 | |
| 3 | |
| 4 | |
| 5 | |
| 6 | |
| 7 | |
| 8 | |
| 9 | |
| 10 | |
| 11 | |
| 12 | |
| 13 | |
| 14 | |
| 15 | |
| 16 | |
| 17 | |
| 18 | |
| 19 | |
| 20 | |
| 21 | |
| 22 | |
| 23 | |
| 24 | |
| 25 | |
| 26 | |
| 27 | |
| 28 | |
| <i>Advanced Display Sys., Inc. v. Kent State Univ.</i> , 212 F.3d 1272 (Fed. Cir. 2000)..... | 2 |
| <i>Estate of Barabin v. AstenJohnson, Inc.</i> , 740 F.3d 457 (9th Cir. 2014) | 5, 6, 7, 13, 17 |
| <i>Barabin v. Astenjohnson, Inc.</i> , 700 F.3d 428 (9th Cir. 2012) | 6 |
| <i>Brown Bag Software v. Symantec Corp.</i> , 960 F.2d 1465 (9th Cir. 1992) | 4 |
| <i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579 (1985)..... | 6, 7, 8, 13, 15, 17 |
| <i>Dream Games of Arizona, Inc. v. PC Onsite</i> , 561 F.3d 983 (9th Cir. 2009) | 3 |
| <i>FTC v. BurnLounge, Inc.</i> , 753 F.2d 878 (9th Cir. 2014) | 6 |
| <i>Feist Publications, Inc. v. Rural Telephone Service Co.</i> , 499 U.S. 340 (1991)..... | 1, 18 |
| <i>Harper House, Inc. v. Thomas Nelson, Inc.</i> , 889 F.2d 197 (9th Cir. 1989) | 4, 16 |
| <i>Interactive Pictures Corp. v. Infinite Pictures, Inc.</i> , 274 F.3d 1371 (Fed. Cir. 2001)..... | 25 |
| <i>Jessen Elec. & Serv. Co. v. Gen. Tel. Co.</i> , 106 F.3d 407 (9th Cir. 1997) | 2, 30 |
| <i>L.A. Printex Industries, Inc. v. Aeropostale, Inc.</i> , 676 F.3d 841 (9th Cir. 2012) | 3 |
| <i>Lakeside-Scott v. Multnomah Cty.</i> , 556 F.3d 797 (9th Cir. 2009) | 1 |
| <i>Mattel, Inc. v. MGA Entertainment, Inc.</i> , 616 F.3d 904 (9th Cir. 2010) | 3, 12 |
| <i>McGlinchy v. Shell Chem. Co.</i> , 845 F.2d 802 (9th Cir. 1988) | 25 |
| <i>Molski v. M.J. Cable, Inc.</i> , 481 F.3d 724 (9th Cir. 2007) | 1 |
| <i>Narell v. Freeman</i> , 872 F.2d 907 (9th Cir. 1989) | 14 |

1 *Newton v. Diamond*,
388 F.3d 1189 (9th Cir. 2003)4, 23

2

3 *Oracle Corp. v. SAP AG*,
765 F.3d 1081 (9th Cir. 2014) 25, 26, 27

4 *Pasillas v. McDonald’s Corp.*,
927 F.2d 440 (9th Cir. 1991)3

5

6 *Rattray v. City of National City*,
51 F.3d 793 (9th Cir. 1994)2

7 *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*,
562 F.2d 1157 (9th Cir. 1977)7

8

9 *Smith v. Jackson*,
84 F.3d 1213 (9th Cir. 1996)2

10 *Swirsky v. Carey*,
376 F.3d 841 (9th Cir. 2004)2, 3

11

12 *Three Boys Music Corp. v. Bolton*,
212 F.3d 477 (9th Cir. 2000) 2, 3, 5, 15

13 *Uniloc USA, Inc. v. Microsoft Corp.*,
632 F.3d 1292 (Fed. Cir. 2011).....25

14

15 *VMG Salsoul, LLC v. Ciccone*,
2013 WL 8600435 (C.D. Cal. Nov. 18, 2013).....11

16 *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*,
259 F.3d 1101 (9th Cir. 2001)10, 17

17

18 **Statutes and Rules**

19 Fed. R. Civ. P. 50(b)1, 21

20 Fed. R. Civ. P. 59(a).....1, 21

21 Fed. R. Evid. 402.....5, 7, 13

22 Fed. R. Evid. 403..... 5, 7, 13, 16, 17

23 Fed. R. Evid. 702.....5, 6, 16

24 Fed. R. Evid. 703..... 5, 7, 13, 15, 21

25

26

27

28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 Introduction

3 The jury’s verdict awarding \$7.4 million in damages against Pharrell
4 Williams, Robin Thicke and More Water From Nazareth Publishing, Inc. (“Counter-
5 Defendants”) for infringing “Got to Give It Up” (“GIVE”) with their song “Blurred
6 Lines” (“BLURRED”) is unfounded, illogical, and a miscarriage of justice. The
7 inconsistent verdict that found liability against Thicke and Williams but exonerated
8 the record company parties plainly shows that the jury did not find that BLURRED
9 was “substantially similar” to GIVE—the only question properly before it. Instead,
10 the defective verdict can be attributed only to prejudicial and irrelevant evidence
11 concerning Thicke’s statements to the press that he wanted to create a song with the
12 same “feel” or “groove” as Marvin Gaye’s song, and to erroneous jury instructions
13 that permitted the jury to find infringement based on similarities of “ideas” between
14 the songs, not of protected expression. But copyright law “*encourages others to*
15 *build freely upon the ideas and information conveyed by a work.*” *Feist*
16 *Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349–350 (1991)
17 (emphasis added) (citation omitted). The jury’s verdict and its unsupported
18 damages award, which run counter to the fundamental purpose of the Copyright Act
19 and have shaken up the music industry, cannot stand. The Court should grant
20 judgment as a matter of law and declaratory relief in favor of Counter-Defendants,
21 order a new trial, or, a very minimum, remit the damages awards.

22 Argument

23 Judgment as a matter of law (“JMOL”) under Fed. R. Civ. P. 50(b) is required
24 where a plaintiff fails to present a legally sufficient basis for a reasonable jury to
25 rule in its favor. *Lakeside-Scott v. Multnomah Cty.*, 556 F.3d 797, 802 (9th Cir.
26 2009). A new trial is appropriate under Fed. R. Civ. P. 59(a) where “the verdict is
27 against the weight of the evidence, [] the damages are excessive, or [] for other
28 reasons, the trial was not fair to the party moving.” *Molski v. M.J. Cable, Inc.*, 481

1 F.3d 724, 729 (9th Cir. 2007); *Rattray v. City of National City*, 51 F.3d 793, 800
2 (9th Cir. 1994) (same, prevent “miscarriage of justice”); *Advanced Display Sys., Inc.*
3 *v. Kent State Univ.*, 212 F.3d 1272, 1275 (Fed. Cir. 2000) (same, for “prejudicial
4 legal error” in jury instructions). Remittitur is appropriate under Rule 59 where the
5 damages awarded by the jury are not supportable, and the “proper amount of a
6 remittitur is the maximum amount sustainable by the evidence.” *Jessen Elec. &*
7 *Serv. Co. v. Gen. Tel. Co.*, 106 F.3d 407 (9th Cir. 1997).

8 **I. INSTRUCTIONAL ERRORS MANDATE A NEW TRIAL**

9 Errors in Instructions 42 and 43 misinformed the jury about how to assess
10 copyright infringement. These errors were highly prejudicial, as they permitted the
11 jury to find infringement based on alleged similarities in elements of the Gayes’
12 work that are not protectable by copyright or included in the Gayes’ narrow
13 copyright in the deposit copy for GIVE (the “Deposit Copy”), which comprises the
14 full extent of the Gayes’ ownership interest in GIVE. (Dkt. 139 at 7-11.)

15 “A copyright plaintiff must prove (1) ownership of the copyright; and
16 (2) infringement—that the defendant copied protected elements of the plaintiff’s
17 work.” *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000). A
18 plaintiff “may establish copying by showing that defendant had access to plaintiff’s
19 work and that the two works are ‘substantially similar’ in idea and in expression of
20 the idea.” *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996). Substantial
21 similarity is assessed under “an objective extrinsic test and a subjective intrinsic
22 test.” *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004). “The extrinsic test
23 considers whether two works share a similarity of ideas and expression as measured
24 by external, objective criteria.” *Id.* This test requires “breaking the works ‘down
25 into their constituent elements, and comparing those elements for proof of copying
26 as measured by ‘substantial similarity.’” *Id.* (quotation omitted). The “intrinsic
27 test is subjective and asks ‘whether the ordinary, reasonable person would find the
28 total concept and feel of the works to be substantially similar.’” *Three Boys Music,*

1 212 F.3d at 485 (quoting *Pasillas v. McDonald's Corp.*, 927 F.2d 440, 442 (9th Cir.
2 1991)).

3 Under both the extrinsic and intrinsic tests, a “finding of substantial similarity
4 between two works can’t be based on similarities in unprotectable elements.”
5 *Mattel, Inc. v. MGA Entertainment, Inc.*, 616 F.3d 904, 916 (9th Cir. 2010). To “the
6 extent a plaintiff’s work is unprotected or unprotectable under copyright, the scope
7 of the copyright must be limited” before assessing substantial similarity. *Brown*
8 *Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1476 (9th Cir. 1992); *L.A. Printex*
9 *Industries, Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 849 (9th Cir. 2012) (“we
10 distinguish protectible from unprotectible elements and ask only whether the
11 protectible elements in two works are substantially similar”); *Swirsky*, 376 F.3d at
12 845 (same). An instruction that invites the jury to consider the “whole work” is thus
13 proper only if “the unprotectable elements [are] identified.” *Dream Games of*
14 *Arizona, Inc. v. PC Onsite*, 561 F.3d 983, 1446 (9th Cir. 2009).

15 Instruction 43—which explained the Gayes’ burden of proving “there is
16 substantial similarity between” the parties’ works (Dkt. 322 at 46; Dkt. 339, 69:2-
17 70:19)—failed to require the jury to limit its assessment of substantial similarity to
18 protected extrinsic elements of GIVE—even though *both parties* argued it should
19 (*see, e.g.*, Dkt. 244 at 12; Dkt. 244-3 at 7, 9-10). The instruction invited the jury to
20 make a freewheeling assessment of similarity based on any and all elements of the
21 Gayes’ work, or the work as a whole, including elements that are not protected by
22 copyright or included in the Deposit Copy. To wit, Instruction 43:

- 23 • Erroneously told the jury to “consider the elements of each of the works and
24 decide if they are substantially similar”—without limiting that consideration
to only elements in the Deposit Copy and protectable by copyright;
- 25 • Erroneously instructed the jury that it “must” consider in assessing similarity
26 both “Theme X” and the keyboard part, which are not in the Deposit Copy;
- 27 • Failed to identify unprotected elements of GIVE—including ones the Court
28 ruled were “unprotected” (Dkt. 139 at 13-21)—or instruct the jury that it must
identify and factor out unprotected elements before assessing similarity;

- 1 • Erroneously instructed the jury that, in applying the extrinsic test, it could
2 disregard similarities in “individual elements” and instead decide “there is
3 enough similarity between a work of the Gaye Parties and an allegedly
4 infringing work of the Thicke Parties to comprise a substantial amount”;
- 5 • Erroneously instructed the jury that similarities between elements need not be
6 “identical” to be “substantial,” an argumentative and unnecessary instruction
7 the Gayes requested that tipped the scales in favor infringement; and
- 8 • Erroneously instructed the jury to apply the intrinsic test by determining “if
9 an ordinary, reasonable listener would conclude that the total concept and feel
10 of the Gaye Parties’ work and the Thicke Parties’ work are substantially
11 similar,” without limiting the test to protectable extrinsic elements of GIVE.

12 (Dkt. 322 at 46.) These errors improperly permitted the jury to find infringement
13 based on unprotected elements of GIVE and elements not found in the Deposit
14 Copy. As discussed in Section II.A, *infra*, the Gayes seized on these errors by
15 making such unprotected elements the focus of their case for substantial similarity.
16 These errors mandate a new trial. *See Harper House, Inc. v. Thomas Nelson, Inc.*,
17 889 F.2d 197, 206-208 (9th Cir. 1989) (ordering new trial and holding that
18 instruction that directed jury to “ask yourself whether the ordinary reasonable
19 person would find the total impact and effect of Defendants’ work substantially
20 similar to Plaintiff’s work” improperly “encouraged the jury to put the two articles
21 next to each other and determine whether they looked alike, not whether defendants
22 copied protectable expression”).

23 Instruction 43 also erroneously instructed the jury that “[i]n considering
24 whether extrinsic or intrinsic similarities are substantial, you may consider whether
25 portions allegedly copied are either qualitatively or quantitatively important to either
26 of the Gaye Parties’ works.” (Dkt. 322 at 46.) As Counter-Defendants argued (*e.g.*,
27 Dkt. 244 at 12-13; Dkt. 270 at 11-12), this question is relevant only *after* a jury
28 determines that there are, in fact, similarities under the extrinsic/intrinsic test, in
which case the jury must assess if those similarities are trivial and not actionable.
See Newton v. Diamond, 388 F.3d 1189, 1195-96 (9th Cir. 2003). By including this
“qualitatively or quantitatively” paragraph in the main instruction on the substantial

1 similarity test, the Court invited the jury to find “substantial similarity” based only
2 on how frequent an element appears in GIVE or how long it lasts. The Gayes took
3 advantage of this error by arguing that the jury should find infringement if it
4 concludes that any one of Ms. Finell’s eight alleged similarities—however
5 miniscule in duration—was important to GIVE. (Dkt. 339, 87:20-88:11.)

6 The Court also erred by instructing the jury in Instruction 42, over Counter-
7 Defendants’ objections (Dkt. 244, 10:25-11:6), that for it “to find that the Thicke
8 Parties copied” GIVE, it need not “find that the Thicke Parties consciously or
9 deliberately copied” the song, but rather it is “sufficient if [it finds] that the Thicke
10 Parties subconsciously copied” the song (Dkt. 322 at 45). This instruction should
11 not have been given. The relevant question for assessing actionable “copying” is
12 whether the works are substantially similar based on the extrinsic/intrinsic test—not
13 whether Counter-Defendants “subconsciously copied.” As explained in *Three Boys*
14 *Music*, the issue of “subconscious copying” concerns whether the defendant had
15 access to a copyrighted work, 212 F.3d at 482-85—a question that was not in
16 dispute here. This instruction was prejudicial based on the improper admission of
17 evidence that Thicke and Williams were influenced by the “groove” and “feel” of
18 GIVE, and by the Gayes’ efforts to portray Thicke and Williams as “copiers.”

19 If judgment is not entered in favor of Counter-Defendants for the reasons
20 discussed below, then the Court should grant a new trial so the Gayes’ claim of
21 infringement of GIVE can be assessed under the proper legal standards.

22 **II. EVIDENTIARY ERRORS MANDATE A NEW TRIAL**

23 The Court erroneously admitted a number of categories of evidence that
24 should have been excluded under Federal Rules of Evidence 402, 403, 702 and 703.

25 A district court’s erroneous failure to admit or exclude evidence is grounds
26 for a new trial where the evidentiary error is prejudicial. *Estate of Barabin v.*
27 *AstenJohnson, Inc.*, 740 F.3d 457, 462 (9th Cir. 2014) (en banc). Where a court
28 erroneously admits or excludes evidence, the “burden [is] on the beneficiary of the

1 error either to prove that there was no injury or to suffer a reversal of his
2 erroneously obtained judgment.” *Id.* at 464. The same standard applies to the
3 improper admission of expert testimony after a district court fails to make
4 “appropriate determinations under *Daubert* and Federal Rule of Evidence 702.” *Id.*
5 at 462; see *FTC v. BurnLounge, Inc.*, 753 F.2d 878, 888 (9th Cir. 2014) (citing
6 *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1985)) (“The Supreme
7 Court in *Daubert* held that ‘the trial judge must ensure that any and all scientific
8 testimony or evidence admitted is not only relevant, but reliable.’”). Indeed, the
9 “decision to admit or exclude expert testimony is often the difference between
10 winning and losing a case. . . . The potentially significant influence of expert
11 testimony underscores the importance of assiduous ‘gatekeeping’ by trial judges.”
12 *Barabin v. Astenjohnson, Inc.*, 700 F.3d 428, 431 (9th Cir. 2012).

13 If the judgment as a matter of law is not granted here, then the Court’s
14 erroneous rulings on several material evidentiary issues mandate a new trial.

15 **A. Ms. Finell’s Testimony Was Inadmissible and Prejudicial**

16 The Court should have prohibited the Gayes’ primary musicology expert,
17 Judith Finell, from testifying at all, or, at a minimum, should have conducted a
18 *Daubert* hearing, which would have prevented her misleading and irrelevant
19 opinions. See *Estate of Barabin*, 740 F.3d at 464 (a “district court cannot abdicate
20 its role as gatekeeper,” and “abuse[s] its discretion by admitting the expert
21 testimony without first finding it to be relevant and reliable under *Daubert*”); *Ellis v.*
22 *Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) (“trial court must . . .
23 [make] a preliminary determination that the expert’s testimony is reliable”).

24 Ms. Finell’s initial expert opinions in the case, including in her Rule 26
25 Report and her deposition in December 2014, were based entirely on alleged
26 similarities between BLURRED and the popular sound recording for GIVE (the
27 “Sound Recording”), which indisputably contains a number of musical and lyrical
28 elements that are not contained in the Deposit Copy. (Dkt. 175-3; Dkt. 175-11.)

1 Indeed, until late summer of 2014, Ms. Finell had never even seen the Deposit
2 Copy. (Dkt. 350, 9:15-12:14; Dkt. 175-10 at 18 (Finell Tr. 99:19-100:14).)
3 Counter-Defendants moved *in limine* to exclude Ms. Finell’s improper opinions
4 based on the Sound Recording, but the Court denied the motion. (Dkt. 174; Dkt.
5 226 at 1.) Counter-Defendants also asked the Court to hold a *Daubert* hearing to
6 ensure that Ms. Finell’s testimony was relevant and reliable, but the Court declined
7 to do so. (Dkt. 277; Dkt. 332, 92:6-93:19; Dkt. 348, 3:21-4:4.)

8 As a result of the Court’s failure to exclude Ms. Finell’s testimony, to hold a
9 *Daubert* hearing, or to make the requisite findings of reliability and relevance,
10 *Barabin*, 740 F.3d at 464, Ms. Finell improperly was permitted to testify about a
11 number of purported “similarities” between BLURRED and GIVE that should never
12 have been presented to the jury, including because they were based on elements
13 Ms. Finell admitted are only “implied” from the Deposit Copy but do not actually
14 appear in it, or that allegedly would be “understood” by a musician to be present in
15 it. (Dkt. 350, 82:20-83:16, 84:6-13, 92:21-93:19; Dkt. 334, 13:14-19.) Ms. Finell
16 described the Deposit Copy as “musical shorthand,” and admitted that some of the
17 “material” in the Sound Recording was “eliminate[d]” from the Deposit Copy, and
18 that the author of the Deposit Copy had to “pick and choose” which elements of the
19 song to include. (Dkt. 334, 31:4-16, 43:15-19; Dkt. 336, 40:9-14; 102:13-17; Dkt.
20 350, 83:18-84:13, 87:18-25.) Yet the twin pillars of her opinion—the purported
21 “heartbeat” of GIVE (keyboard and bass) and Theme X—are not written in the
22 Deposit Copy, even though they plainly could have been. (See Dkt. 334, 49:14-19,
23 351, 104:5-105:6.)

24 Copyright protection “extends only to the particular expression of the idea” of
25 an artistic work—not to expression that purportedly can be “inferred” or “implied”
26 therefrom or that was “eliminated” from a work before registration. *See, e.g., Sid &*
27 *Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1162 (9th
28

1 Cir. 1977). Ms. Finell's opinions based on the Sound Recording were irrelevant and
2 misleading and should have been excluded. Fed. R. Evid. 402, 403, 703.

3 Ms. Finell's testimony about purported similarities between unprotected
4 elements of the works was unquestionably prejudicial to Counter-Defendants—the
5 Gayes' entire infringement case was built around her testimony, which was easily
6 the longest of any witness's in the case. The Court's decision not to hold a pre-trial
7 *Daubert* hearing compounded the prejudice by putting Counter-Defendants in the
8 unenviable position of having to object repeatedly to Ms. Finell's testimony until the
9 Court ultimately granted counsel a standing objection on the issue of material not
10 found in the Deposit Copy. (Dkt. 336, 115:14-15, 116:23-24, 123:21-25.) Although
11 many of Counter-Defendants' objections were sustained and much of Ms. Finell's
12 testimony was stricken *after it was given*, the net effect of this cumbersome process
13 was extremely prejudicial to Counter-Defendants: (1) the jury likely concluded that
14 Counter-Defendants were overly concerned by Ms. Finell's testimony or were
15 desiring to obstruct and delay the proceedings; (2) Ms. Finell was able to present to
16 the jury testimony, demonstratives, and music that the jury never should have seen
17 or heard; and (3) the jury faced an impossible task of having to constantly
18 distinguish between the select parts of what they saw and heard each day that they
19 could consider later in reaching their verdict, and the parts they could not.²

20 As discussed below, even if Ms. Finell's testimony should not have been
21 precluded entirely, a number of her opinions were improper and should have been
22 excluded. Each of these evidentiary errors was prejudicial and justifies a new trial.

23

24

25 ² For example, Ms. Finell testified about and showed the jury a chart depicting
26 purported similarities between the "themes in terms of the story lines" the songs
27 share. (Dk. 336, 148:13-149:9.) Counter-Defendants were compelled to object, as
28 Ms. Finell has no basis to opine about literary themes (nor are themes alone
protectable by copyright, since they are mere ideas). Although the Court sustained
the objection and struck the testimony, Counter-Defendants had already been
prejudiced by the improper disclosure to the jury of this improper "similarity"
opinion and by their need to argue in front of the jury that it should be excluded.

1 **1. Testimony About Theme X Was Inadmissible**

2 The Court ruled on summary judgment that the so-called “Theme X”—a four-
3 note melody consisting of scale degrees 3-3-2#-3—does not appear in the Deposit
4 Copy. (Dkt. 139 at 18.) Recognizing (albeit belatedly) that a central part of her
5 expert opinion was rendered irrelevant by the Court’s ruling, on February 4, 2015,
6 Ms. Finell filed a declaration stating that “we wanted to clarify that ‘my’ Theme X,
7 the four note vocal melody represented in the deposit copy lead sheets, is not the
8 same as the Theme X the Court said was not in the lead sheet.” (Dkt. 246-2 at 3:2-
9 4.) Ms. Finell thus admitted that the 3-3-2#-3 vocal melody is not “her” Theme X.
10 Ms. Finell attached to her declaration a page from the Deposit Copy on which she
11 had circled “her” Theme X, namely, a four-note melody with scale degrees 5-5-6-5
12 (and with a different rhythm than the 3-3-2#-3 melody the Court had ruled on). (*Id.*
13 at Exh. A.) On February 18, 2015, Ms. Finell submitted another declaration, this
14 time stating: “I do not disagree with [the Court’s] conclusion” that Theme X does
15 not appear in the Deposit Copy for GIVE, Part 1. (Dkt. 271 at 2:23-24, n. 1.)
16 Ms. Finell said nothing at the time about professional musicians being able to
17 discern from the 5-5-6-5 melody that a different 3-3-2#-3 melody should be played.

18 Ms. Finell thus admitted twice before trial that the 3-3-2#-3 melody was *not*
19 in the Deposit Copy. Nonetheless, at trial, and over Counter-Defendants’ vigorous
20 objections, Ms. Finell testified about and played excerpts of the original 3-3-2#-3
21 version of Theme X (*i.e.*, “dancin’ lady”) that she had stated before trial was not
22 “her” Theme X. She initially testified that Theme X was not in the Deposit Copy
23 and that only a supposed “variant” of Theme X (*i.e.*, “fancy lady,” which she
24 admitted has different notes and rhythm) appears in the Deposit Copy. (Dkt. 336,
25 98:18-110:7.) After Counter-Defendants objected again to the admission of
26 testimony about Theme X (Dkt. 336, 110:8-112:3), Ms. Finell changed course and
27 testified that Theme X was, “in [her] opinion,” in the Deposit Copy (Dkt. 336,
28 112:18-24). The Court then permitted Ms. Finell to testify about and play Theme X

1 for the jury. Ms. Finell proceeded to testify to broad purported similarities between
2 Theme X and elements in BLURRED.

3 On cross-examination, Ms. Finell admitted that the Theme X 3-3-2#-3
4 melody she had just played to the jury is not contained in the Deposit Copy.
5 (Dkt. 350 at 86:13-23.) She also admitted that she found Theme X in GIVE only by
6 transcribing the Sound Recording—not by deriving it from the Deposit Copy. (Dkt.
7 350, 78:7-81:25.) Nonetheless, Ms. Finell maintained that Theme X is “implied” in
8 the Deposit Copy (Dkt. 350, 82:20-83:16), and that professional musicians “would
9 understand” that Theme X is “what’s meant here,” even though it is not written in
10 the Deposit Copy (Dkt. 350, 84:6-13; *see* Dkt. 350, 92:21-93:19).

11 Ms. Finell’s “implied” Theme X testimony is irrelevant and highly
12 misleading. The Gayes own a copyright in the composition for GIVE as it was fixed
13 in a tangible form in the Deposit Copy—not in the musical interpretation that
14 professional musicians supposedly “would understand” they might play *in addition*
15 *to* the specific notes that actually appear in the Deposit Copy. Ms. Finell’s claim
16 that there was room for expert “opinion” as to what the Deposit Copy contains was
17 sheer sophistry. The Deposit Copy contains certain notes written on paper—that is a
18 fact. There is no possible “opinion” as to what is contained in the Deposit Copy—
19 the sheet music speaks for itself. The only permissible “opinion” was whether the
20 Deposit Copy is extrinsically similar to BLURRED. Ms. Finell’s testimony on
21 Theme X was neither relevant nor reliable and should have been excluded.

22 In addition, Ms. Finell’s opinion that Theme X is “implied” in the Deposit
23 Copy should have been excluded because it was not disclosed at any time before
24 trial, including in her Rule 26 expert report (Dkt. 175-3), at her deposition
25 (Dkt. 175-11), or even in her subsequent declarations (Dkt. 263-1 at 32-33, ¶ 56).
26 *See Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir.
27 2001) (Rule 37(c) “forbid[s] the use at trial of any information required to be
28 disclosed by Rule 26(a) that is not properly disclosed”).

1 Counter-Defendants were substantially prejudiced by Ms. Finell’s testimony
2 about Theme X, which was one of the twin pillars of the Gayes’ similarity case.
3 Ms. Finell improperly: (1) played edited sound recordings of Theme X and
4 compared them to melodies in BLURRED; (2) testified that the Theme X 3-3-2#-3
5 melody appeared in more than 25% of BLURRED; (3) testified that there are
6 “identical” notes in both songs; and (4) testified that this similarity is significant
7 because the 2# in Theme X is a purported “broken rule” that makes it a “red flag” of
8 alleged copying. (Dkt. 336, 105:18-19, 113:1-121:5; Tr. Exh. 376, Slides 11, 13-
9 15.) The Gayes’ counsel played several of Ms. Finell’s Theme X 3-3-2#-3 edited
10 sound recordings for Williams during his cross-examination, and Williams admitted
11 that the 3-3-2#-3 notes sounded similar in GIVE and BLURRED—an admission
12 that was harmful, prejudicial, and irrelevant because the Theme X 3-3-2#-3 melody
13 is not in the Deposit Copy. (Dkt. 338, 124:13-128:6; Tr. Exh. 376, Slides 11-14.)

14 **2. Testimony About the Keyboard Parts Was Inadmissible**

15 The Court ruled on summary judgment (Dkt. 139 at 21) that the Deposit Copy
16 does not contain a keyboard part, other than the harmony of an A7 chord, which is
17 not protectable in itself as a matter of law, *see VMG Salsoul, LLC v. Ciccone*, 2013
18 WL 8600435, at *7-8 (C.D. Cal. Nov. 18, 2013), and that the rhythm of the Sound
19 Recording keyboard is not in the Deposit Copy. Ms. Finell opined in her Rule 26
20 report that the keyboard is not in the Deposit Copy: “the deposit copy (lead sheet)
21 for ‘Got to Give It Up’ excludes all of the ... instrumental lines, so there is no
22 keyboard Only rudimentary chord indications are shown.” (Dkt. 175-3 at 33, ¶
23 80.) Ms. Finell testified at her deposition that the voicing (actual notes) and rhythm
24 of the Sound Recording keyboard are not in the Deposit Copy. (Dkt. 277 at 16-18.)

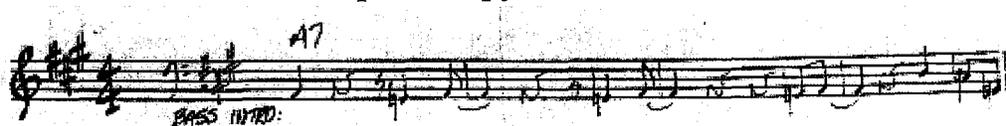
25 Nonetheless, over Counter-Defendants’ objections (Dkt. 332, 89:8-93:19;
26 Dkt. 336, 42:6-57:8), Ms. Finell was permitted to testify that the keyboard part in
27 the Sound Recording, including its rhythm, is similar to the keyboard in BLURRED.
28 She also played edited sound recordings comparing the keyboard from the Sound

1 Recording to the keyboard in BLURRED. Ms. Finell referred to these keyboard
2 parts as the “heartbeat” of GIVE, and she played them repeatedly for the jury and
3 claimed they were similar to BLURRED. (Dkt. 332, 89:8-91:24; Dkt. 336, 42:6-
4 51:3, 52:24-57:8, 135:12-137:16, 138:13-142:17; Tr. Exh. 376, Slides 2, 19.)

5 Ms. Finell made it abundantly clear during her testimony that her opinion
6 regarding the keyboard parts was based on a gross extrapolation of the music that
7 actually appears in the Deposit Copy. She prepared the following transcription of
8 the GIVE Sound Recording keyboard part that she claimed is in the Deposit Copy:



9
10
11
12 (Tr. Exh. 376, Slide 19; see Dkt. 336, 135:12-136:16.) Ms. Finell showed the above
13 transcription to the jury and claimed that it (left and right hand parts) is contained in
14 the first four measures of the Deposit Copy, which are set forth below:



15
16
17
18 (Tr. Exh. 248; Dkt. 334, 5:25-8:2.) Ms. Finell later admitted on cross-examination
19 that: (1) the specific notes and rhythms of the Sound Recording keyboard part are
20 not in the Deposit Copy; (2) there a number of different ways to play the A7 chord
21 on a keyboard; and (3) the Deposit Copy does not indicate any keyboard part at all.
22 (Dkt. 334, 8:21-14:13.) As with Theme X, however, Ms. Finell testified that, in her
23 opinion, professional musicians “would understand” to play the keyboard part as she
24 transcribed it, even though it is not in the Deposit Copy. (Dkt. 334, 13:14-19.)

25 What professional musicians supposedly may know to play but that is not
26 fixed in a tangible form is not relevant to copyright infringement. Indeed, that “all
27 professional musicians” supposedly would know to play the keyboard part—even
28 though it is not in the Deposit Copy—shows that the keyboard part is unprotectable

1 as *scenes a faire*, and must be available for all musicians to use. *See Mattel*, 616
2 F.3d at 913. Further, as discussed above with Theme X, that the keyboard is not in
3 the Deposit Copy is not a topic for expert opinion—it is an underlying fact.³ Ms.
4 Finell’s testimony was therefore prejudicial and misleading and should have been
5 excluded. Fed. R. Evid. 402, 403, 703; *Estate of Barabin*, 740 F.3d at 464.⁴

6 **3. Testimony About the Bass Melody Was Inadmissible**

7 Ms. Finell testified that the bass part used in her edited versions of the Sound
8 Recording is found in the Deposit Copy, and that it is part of the “heartbeat” of
9 GIVE that allegedly is similar to BLURRED. (Dkt. 336, 121:7-135:10; Tr. Exh.
10 376, Slides 16-18.) Yet the bass part Ms. Finell testified to and included in her
11 edited sound recording differs from the Deposit Copy in numerous respects,
12 including that the descending bass melody in the Deposit Copy starts on the 4th
13 scale degree, while Ms. Finell’s transcription from the Sound Recording bass part
14 starts on the 5th scale degree—a deliberate choice on her part because the 5th scale
15 degree makes it more similar to the descending bass melody in BLURRED. (Dkt.
16 334, 17:15-23:17; Tr. Exh. 376, Slide 18.) In other words, because the Deposit
17 Copy did not support her similarity claim, Ms. Finell simply chose a bass part from
18 the Sound Recording that was more similar to BLURRED, and played it for the jury
19 in her edited sound recordings. Ms. Finell admitted that her testimony and edited
20 recordings were based entirely on her transcription of “Marvin Gaye playing his
21 own bass” in the excluded Sound Recording. (Dkt. 334, 23:13-17.) Because neither
22 Ms. Finell’s transcriptions nor her edited audio examples of the bass taken from the

23 ³ Ms. Wilbur testified that the A7 chord in GIVE does not indicate any specific
24 instrument, notes or rhythms to play the A7 harmony (chord) in accompanying the
25 GIVE vocal melody. (Dkt. 351, 103:15-108:2, 111:8-11, 112:6-18; 113:16-116:17.)

26 ⁴ As a clear sign that Ms. Finell’s testimony was prejudicial to Counter-
27 Defendants and confusing to the jury, a juror submitted a written question for the
28 Court to pose to Ms. Finell asking: “In the expert witness’s opinion, did she assert
that there is only one way to write down a chord when making musical notation so
although it implies several notes are played, it would always be written and implied
the exact same way in all music?” (Dkt. 334, 104:22-105:2.) This question was so
confounding that the Court declined to even try to answer it. (*Id.*, 105:4-106:11.)

1 Sound Recording are in the Deposit Copy, the Court erred by permitting her to
2 present them to the jury, particularly without conducting a *Daubert* hearing first.

3 The prejudice from Ms. Finell's improper testimony about the bass and
4 keyboard—the supposed “heartbeat” of GIVE—was exacerbated by the testimony
5 of the Gayes' other musicologist, Dr. Ingrid Monson, about those same elements
6 (Dkt. 334, 70:24-75:22, 78:10-24.) The bass and keyboard were the only aspects of
7 GIVE that Dr. Monson addressed, thus underscoring their perceived importance.
8 Dr. Monson also played for the jury an audio “mash-up” that consisted solely of the
9 Sound Recording bass and keyboard parts (not found in the Deposit Copy) “mashed
10 up” with the vocal melody from BLURRED. (Dkt. 334, 79:16-83:16.) The Gayes'
11 experts thus improperly and prejudicially made the “heartbeat” of the Sound
12 Recording (along with Theme X) the two pillars of their similarity case at trial.

13 **4. Testimony About the Signature Phrase Was Inadmissible**

14 Ms. Finell's transcription of the so-called GIVE “Signature Phrase” (a term
15 invented by Ms. Finell) also was based on the Sound Recording, not the Deposit
16 Copy. (Dkt. 350, 38:16-51:8; Tr. Exh. 376, Slide 3.) Her transcription and edited
17 sound recording of the GIVE Signature Phrase—which, as Ms. Finell testified, is
18 how Marvin Gaye sings it on the Sound Recording—differ from the notes in the
19 Deposit Copy in that the last note (f#) as transcribed by Ms. Finell has a different
20 duration than in the Deposit Copy. (Dkt. 350, 38:16-51:8; Tr. Exh. 376, Slide 3.)
21 Ms. Finell should not have been permitted to offer irrelevant testimony about
22 similarities in the Signature Phrase.

23 **5. Testimony About Lyrics Was Inadmissible**

24 The Court denied Counter-Defendants' motion to exclude Ms. Finell's
25 opinion on purported lyrical similarities (Dkt. 174 at 16-18; Dkt. 226 at 2), and thus
26 permitted her to testify to alleged similarities in the use of the words “up,” “down,”
27 “shake,” and “round” in each song (Dkt. 336, 142:22-147:3; Tr. Exh. 376, Slide 32).
28 These ordinary words are not protected by copyright, and Ms. Finell's testimony

1 about them was irrelevant and misleading. *See* 37 C.F.R. 202.1(a) (single words and
2 short phrases are not protected); *Narell v. Freeman*, 872 F.2d 907, 911 (9th Cir.
3 1989) (same). To compound the prejudice from this irrelevant testimony, Ms. Finell
4 opined that the melodies in both songs went up in pitch on the word “up” and down
5 in pitch on the word “down” (so-called “word painting”), which is simply an
6 unprotected (and unremarkable) idea over which the Gayes surely cannot claim a
7 monopoly. (*Id.*; Dkt. 322 at 31 (Instruction 30) (“Similarity that is confined to ideas
8 and general concepts is not infringing”).) The prejudice from this testimony was
9 further enhanced by the Court’s refusal to separately instruct the jury that ordinary
10 words are not protected, as Counter-Defendants requested. (Dkt. 267 at 14.)

11 **6. Testimony About Edited and Transcribed Versions of the**
12 **Sound Recording Was Inadmissible**

13 Ms. Finell infused her testimony with her edited versions of the Sound
14 Recording and her transcriptions of the same. (*See, e.g.*, Dkt. 336, 52:24-57:13,
15 59:25-73:15, 77:6-79:6, 99:18-110:7,112:12-117:18,121:19-127:15.) The Court
16 ruled before trial that edited sound recordings could be used for purposes of the
17 intrinsic test, but only if limited to elements in the Deposit Copy. The Court,
18 however, did not conduct a *Daubert* hearing or make any specific findings that Ms.
19 Finell’s recordings were so limited. Fed. R. Evid. 703. And they were not: the
20 recordings included the keyboard part, Theme X, and the Sound Recording bass
21 melody that differs from the Deposit Copy bass. (Dkt. 336, 52:5-57:10, 105:5-
22 116:12; 123:18-127:15; 129:7-131:21; 135:12-137:10, 138:13-142:17; Tr. Exh. 376,
23 Slides 2, 11, 13-14, 16-20.)

24 There was no reason for the Court to expose the jury to edited versions of the
25 Sound Recording. The Court allowed audio examples to be played in response to
26 the Gayes’ concern about providing evidence of intrinsic similarity. (Dkt. 231, 4-6;
27 Dkt. 251 at 3-4.) But, as noted above, the intrinsic test turns on whether the
28 “ordinary, reasonable person would find the total concept and feel of the works to be

1 substantially similar.” *Three Boys Music*, 212 F.3d at 485 (citation omitted). Ms.
2 Finell’s edited recordings by their very nature do not depict the “total concept and
3 feel” of GIVE, but instead were cherry-picked to select tiny fragments of GIVE that
4 sounded the most similar to BLURRED—and that were primarily based on elements
5 not found in the Deposit Copy that are wholly irrelevant to the intrinsic test. *Harper*
6 *House*, 889 F.2d at 206-208 (similarity cannot be based on unprotected elements).

7 Even if her edited sound recordings could have been useful for the intrinsic
8 test, the Court repeatedly instructed the jury not to consider them but instead to
9 consider only her opinions. (*E.g.*, Dkt. 336, 51:6-52:22, 70:24-71:25, 73:5-15.)
10 This limiting instruction was incredibly confusing—as the Court itself
11 acknowledged. (Dkt. 336, 52:12-19.) It also ensured that the edited sound
12 recordings would not be used by the jury in conducting the intrinsic test, thus
13 negating the Court’s sole purpose in allowing them to be played in the first place.

14 Similarly, Ms. Finell should not have been permitted to testify concerning
15 written transcriptions of the Sound Recording. Every transcription that she used at
16 trial was based on the Sound Recording. (Tr. Exh. 376, Slides 3, 16, 18-20 (*see*
17 timing indications in the Sound Recording below each transcription, *e.g.*, “0:19”).)
18 Indeed, the transcriptions she used at trial were the same ones she relied on in her
19 October 17, 2013, preliminary report—*before she had ever even reviewed the*
20 *Deposit Copy*. (*Compare*, Tr. Exh. 376, Slide 3, *with* Dkt. 175-3, p. 52 of 65
21 {Signature Phrase} and Tr. Exh. 376, Slide 18, *with* Dkt. 175-3, p. 61 of 65
22 {Descending Bass}.) The Deposit Copy is the copyrighted composition. It is the
23 best evidence of itself. The only reason Ms. Finell transcribed the Sound Recording
24 is because its notes differed from the Deposit Copy and, in her estimation, gave her
25 a better argument on similarity. This evidence should not have been admitted.

26 **B. Testimony About the Gayes’ Mash-Ups Was Inadmissible**

27 The Court also erred by allowing the Gayes’ other musicologist, Ingrid
28 Monson, to testify about and play audio “mash-ups” of BLURRED and GIVE. Fed.

1 R. Evid. 403, 702. The Court denied Counter-Defendants' pretrial motion to
2 exclude the mash-ups and overruled their subsequent objections to their use at trial.
3 (Dkt. 226 at 1; Dkt. 253 at 53-55.) The Court also refused to conduct a *Daubert*
4 hearing or to otherwise assess whether the mash-ups of GIVE and BLURRED were
5 reliable or helpful to the jury. *Barabin*, 740 F.3d at 464. These mash-ups were
6 prejudicial and irrelevant and should not have been played to the jury.

7 *First*, the mash-ups were prepared after the close of expert discovery and thus
8 were not disclosed in Dr. Monson's Rule 26 report or expert deposition. (Dkt. 175-
9 11.) *See Yeti by Molly*, 259 F.3d at 1106.

10 *Second*, the mash-ups included the keyboard and bass elements of the GIVE
11 Sound Recording ("accompaniment" parts) that are not in the Deposit Copy. (Dkt.
12 334, 79:16-83:16; *see also* Tr. Exh. 377, Slide 1; Dkt. 253 at 53-55.)

13 *Third*, the mash-ups should have been excluded under Rule 403 because any
14 limited relevance—and there was none—was far outweighed by their prejudicial
15 effect. Dr. Monson admitted at trial that "any number of melodies . . . could fit over
16 the relatively simple chord pattern of" BLURRED, and that the mash-ups show only
17 that the melodies and harmonies in the two songs are "compatible in some way."
18 (Dkt. 334, 115:3-117:19.) But the "compatibility" of melodies and harmonies is an
19 unprotectable idea, not tangible expression that could be protectable by copyright.
20 Perhaps for this reason, the supposed "compatibility" of the melodies and harmonies
21 in the two songs is not one of Ms. Finell's claimed "extrinsic similarities." The
22 probative value of the mash-ups was thus sorely lacking. On the other hand, to a lay
23 juror, that one song's melody sounds crudely harmonious played over another's
24 songs instrumental would appear to have significance (when it has none),
25 particularly when the jury understood that the Court had sanctioned these mash-ups
26 and when it observed that Counter-Defendants were objecting to them.

27 Finally, the prejudice to Counter-Defendants from the Gayes' mash-ups was
28 compounded by the Court's decision to exclude mash-ups created by Counter-

1 Defendants’ musicologist, Sandy Wilbur, that showed that the vocal melody of
2 GIVE could be “mashed up” with a number of old soul songs, as well as an “Axis of
3 Awesome” video showing that numerous popular songs could be played over the
4 same four chords. (Dkt. 272 at 2.) This evidence would have mitigated some of the
5 prejudice to Counter-Defendants by demonstrating, in an audible way, that the
6 concept of “mashing up” one song over another has no bearing on alleged copying.

7 **C. Testimony About Press Statements Was Inadmissible**

8 The Court ruled on summary judgment that evidence of statements Thicke
9 and Williams made to the press about creating BLURRED “do not constitute direct
10 evidence of copying” because they do not show that Counter-Defendants “copied
11 protected elements of [the Gayes’] compositions, or that they engaged in virtual
12 duplication” of GIVE, and are not otherwise relevant to the “infringement analysis”
13 because Counter-Defendants concede they had access to GIVE. (Dkt. 139 at 12-13.)
14 Nonetheless, the Court denied Counter-Defendants’ motion *in limine* to exclude this
15 evidence. (Dkt. 226 at 2.) Similarly, the Court erroneously permitted the Gayes to
16 present evidence that Marvin Gaye’s name was invoked in the course of publicity
17 for BLURRED. (Dkt. 226 at 2; *see* Dkt. 169.) Seizing on these rulings, the Gayes
18 made these press statements a central focus of their case-in-chief and argued that
19 there was direct copying. The Gayes’ counsel also repeatedly asked questions and
20 made arguments concerning Counter-Defendants’ alleged improper use of Marvin
21 Gaye’s name in marketing BLURRED. (Dkt. 331, 26:21-27:5, 39:23-40:19; 43:1-6,
22 15-19; Dkt. 338, 14:19-26:14; Dkt. 339, 81:19-82:9.)

23 None of this evidence was relevant. As the Court recognized in its summary
24 judgment order, press statements were of limited if any probative value to the case.
25 At most, they showed that Counter-Defendants were inspired by the “feel” or
26 “groove” of GIVE. But striving to emulate a sound, feel, or groove of another song,
27 or to evoke its era or style, is not infringement—in fact it is precisely what the
28 Copyright Act seeks to encourage. *See Feist Publications*, 499 U.S. at 349–350.

1 Counter-Defendants’ comments on wanting to create a song with the same feel as
2 GIVE—regardless of their truth—are thus legally irrelevant. At the same time,
3 these statements were highly prejudicial because they could be wrongly interpreted
4 as evidence of “copying,” particularly in light of the erroneous instructions
5 discussed above, even though the statements—even if true—do not tend to prove or
6 disprove that BLURRED is “substantially similar” to GIVE. The Court should have
7 excluded evidence of press statements.

8 **D. The Court’s Rulings Regarding Evidence of Lay Opinions On**
9 **Similarity Were Erroneous, Unfair and Prejudicial**

10 The Court correctly granted Counter-Defendants’ motion to exclude evidence
11 of lay opinions regarding similarity as irrelevant and prejudicial. (Dkt. 226 at 2.)
12 Yet the Court undermined this ruling by erroneously permitting two lay witnesses—
13 Harry Weinger and Janis Gaye—to testify to that issue. (*See id.*; Dkt. 251 at 2.)

14 At trial, Ms. Gaye testified that when she first heard BLURRED, she thought
15 it copied the Sound Recording and assumed that GIVE had been licensed for
16 BLURRED; she then contacted the Gayes’ music publisher, EMI, and learned there
17 was no license. (Dkt. 349, 11:6-12:16.) She does not read music and does not know
18 what elements of the Sound Recording are in the Deposit Copy. (Dkt. 349, 15:4-9.)

19 Mr. Weinger testified that, in his lay opinion, BLURRED was “utterly based
20 on” GIVE. (Dkt. 336, 14:10-19.) Mr. Weinger likewise had never seen the Deposit
21 Copy, has no musical training, cannot read music, worked for a division of UMG
22 that had nothing to do with the creation or distribution of BLURRED, and based his
23 opinion entirely on the Sound Recording. (Dkt. 336, 29:20-30:21; 38:12-17.)

24 These irrelevant lay opinions of similarity were highly prejudicial to Counter-
25 Defendants because they enabled the Gayes to argue that two individuals with
26 experience in the music industry—including Mr. Weinger, who was characterized
27 by the Gayes as a senior executive of the counter-defendants that had distributed
28 BLURRED—had concluded that BLURRED infringed GIVE. The Gayes

1 emphasized Mr. Weinger’s opinion in their opening statement and closing argument.
2 (Dkt. 331, 41:22-42:25; Dkt. 339, 79:17-18, 80:8-18, 98:1-3.) Because this
3 testimony was irrelevant, confusing, and misleading, it should have been excluded.

4 The Court compounded the prejudice from this testimony by excluding
5 evidence that EMI—which is in the business of pursuing infringement claims for the
6 library of compositions it administers, and which had the exclusive right to sue for
7 infringement of GIVE under its administration agreement with the Gayes—not only
8 determined not to pursue an infringement claim based on BLURRED, but
9 concluded, after consulting an outside musicologist, that it could not do so
10 consistent with Rule 11. (Dkt. 226, 2-3; *see also* Dkt. 163, 164, 195; *see also*, Dkt.
11 349, 17:22-18:24.) The Gayes were thus allowed to present the irrelevant lay
12 opinions of Ms. Gaye and Mr. Weinger that the songs sounded similar—based
13 entirely on the excluded Sound Recording—but Counter-Defendants were precluded
14 from presenting the contrary conclusion reached by EMI, the Gayes’ own agent
15 authorized to assert infringement claims, or questioning Ms. Gaye about her
16 discussions with EMI on this issue. These rulings were erroneous and prejudicial.

17 **E. Nancie Stern’s Opinions About Infringement Were Inadmissible**

18 Counter-Defendants moved to exclude the testimony of the Gayes’ licensing
19 expert, Nancie Stern. (Dkt. 170.) The Court denied the Motion but ruled that “her
20 testimony is limited to her claimed expertise, *i.e.*, the appropriate means of
21 determining licensing valuation, *and shall not concern the ultimate issue of*
22 *infringement.*” (Dkt. 272 at 2 (emphasis added); Dkt. 226 at 2.) As discussed in
23 Section IV.A, *infra*, Ms. Stern’s testimony should have been excluded entirely. At a
24 minimum, the Court erred by allowing her to testify regarding “similarity.”

25 Ms. Stern’s opinion is that the Gayes would have requested 50% of the
26 copyright (*i.e.*, 50% of publishing revenue) in the BLURRED composition had a
27 license been sought before the release of BLURRED, and 75% to 100% of the
28 revenue if a license were sought after BLURRED’s release. (Dkt. 351, 27:18-

1 28:22.) Although her opinion was based entirely on listening to the Sound
2 Recording, she changed course at trial—clearly in response to the Court’s pretrial
3 ruling excluding the Sound Recording—and testified that her opinions were based
4 “only” on Ms. Finell’s edited sound recordings. (Dkt. 351, 25:20-28:15, 36:10-
5 37:14.) Even if this were the case, her testimony still should have been excluded.

6 *First*, Ms. Finell’s edited sound recordings that Ms. Stern purported to rely
7 upon contain elements (*e.g.*, Theme X, keyboard) not found in the Deposit Copy,
8 and thus are not a reliable source from which Ms. Stern could determine the amount
9 of GIVE (Deposit Copy) that was used in BLURRED. Fed. R. Evid. 703.

10 *Second*, by purporting to quantify “how much” of GIVE was used in
11 BLURRED, Ms. Stern acted as a (lay) musicologist—contrary to the Court’s ruling
12 (Dkt. 272 at 2)—and gave an improper lay opinion on alleged infringement. The
13 only way Ms. Stern could opine to how much of a license fee the Gayes supposedly
14 would have demanded for the use of GIVE in BLURRED was to assess how much
15 of GIVE was in BLURRED. Indeed, she testified that this is how she arrived at her
16 opinion. (351, 25:20-28:15,) She thus gave an unfounded musicology opinion, and
17 her testimony was prejudicial. Telling of the confusion and prejudice her testimony
18 created, the jury sent a note during deliberations asking whether Ms. Stern was an
19 expert on infringement. (Dkt. 313, 1.)

20 **III. THE EVIDENCE DOES NOT SUPPORT THE INFRINGEMENT**
21 **VERDICT**

22 The jury’s inconsistent verdict answered the question whether Williams and
23 Thicke were “infringers”—but not whether BLURRED infringed GIVE. Because
24 no properly instructed, reasonable juror could find that BLURRED infringes GIVE,
25 and because in any case the jury’s infringement finding here is against the clear
26 weight of the evidence, even assuming its admissibility, the Court should grant
27 JMOL or, alternatively, a new trial. Fed. R. Civ. P. 50(b); Fed. R. Civ. P. 59(a).

28 ///

1 **A. The Verdict Is Not Supported By Legally Sufficient Evidence Of**
2 **Substantial Extrinsic Similarity**

3 There is insufficient evidence of substantial “extrinsic” similarities between
4 BLURRED and GIVE to support the jury’s finding of infringement. Of the eight
5 alleged extrinsic similarities Ms. Finell identified, Theme X and the keyboard part
6 are not in the Deposit Copy, as explained above, and the lyrics have no similarities
7 at all—there are not two words in a row in common in both songs. (Dkt. 334,
8 26:18-27:24; Tr. Exh. 376, Slide 35.) The other five similarities claimed by Ms.
9 Finell are belied by the evidence and, even if they exist, plainly not “substantial”:

10 1. **Signature Phrases**: The so-called BLURRED Signature Phrase is 6 ½
11 beats long and contains 12 notes, of which only 5 notes are the same pitches as in
12 the 10-note so-called GIVE Signature Phrase. These 5 common pitches have
13 different rhythms and placements in each song. The beginning, middle, and ending
14 notes are different. The BLURRED Signature Phrase occurs only twice in the 4:20
15 minute recording, for about 6 seconds. (Dkt. 350, 14:10-38:15.) The claim is thus
16 that six seconds of BLURRED contain a short melodic phrase, sung only twice, that
17 has a few notes within it with the same pitch as the notes in a GIVE phrase, even
18 though the common notes are in different locations and rhythms.

19 2. **Hooks**: The GIVE “hook” is 4 notes, 3 of which are the same pitch as
20 3 of the 12 notes in the BLURRED Signature Phrase (discussed above). The
21 rhythms and placement of the 3 common notes are different. The most important
22 note in GIVE (2nd scale degree) is not in BLURRED. The GIVE hook appears only
23 twice in BLURRED, and only in its Signature Phrase. (Dkt. 350, 67:17-78:6.) The
24 entire claim is that a phrase that occurs for six seconds in BLURRED has a few
25 notes within it that have the same pitch as a few notes in the hook phrase in GIVE.

26 3. **Bass Melody**: There are only 3 notes in common between the 25-note
27 bass part in BLURRED and the 21-note “bass intro” in the Deposit Copy of GIVE.
28 Those 3 common notes are merely the root, or 1st scale degree—the most common

1 bass note in popular music. In contrast, GIVE has a distinctive, repeated use of the
2 7th scale degree not found in BLURRED. (Dkt. 351, 146:18-161:10; Tr. Exh. 389.)

3 4. **Word Painting:** The claimed similarity is that the words “up,”
4 “shake,” “down,” and “round” appear in the break sections in each song, and the
5 melody goes up in pitch on the word “up” and down in pitch on the word “down.”
6 These ordinary words are not protected by copyright. They are sung to different
7 melodies, lyrics, word orders, and rhythms in each song, and appear only once for a
8 few seconds in BLURRED. The claim that both songs go up in pitch on “up” and
9 down in pitch on “down” (so-called “word painting”) is an unprotectable idea, and
10 the actual expression differs. (Dkt. 334, 27:25-28:14; Tr. Exh. 376, Slide 32.)

11 5. **Rap v. Parlando:** There are no similarities between the *expressions* of
12 the “rap” in BLURRED and the so-called “parlando” in GIVE. The only claimed
13 similarity is that both sections start at the same measure (Dkt. 336, 151:13-154:24),
14 but the Gayes do not own the “idea” of where in a song a new section should start.
15 Moreover, Clifford Harris, Jr., performed the rap section of BLURRED months after
16 Thicke and Williams created the song, and he chose where to place it. (Dkt. 338,
17 112:10-23.) The jury’s verdict was in favor of Harris, thus reflecting its finding that
18 the rap section was not substantially similar to the parlando in GIVE.

19 In sum, Ms. Finell’s opinion of similarity boils down to the following:

- 20 • A 3-second vocal melody sung twice in BLURRED with a few pitches (but
21 not their rhythm or placement) in common with two phrases in GIVE;
22 • A bass part that plays the root, or most common bass note in popular music,
23 in the same place in only 3 out of 25 notes over an 8 measure phrase; and
24 • Both songs have dissimilar vocal sections that start at the same measure.

24 These purported similarities are “de minimis” and not substantial. *See*
25 *Newton*, 388 F.3d at 1193 (use is de minimis “if the average audience would not
26 recognize the appropriation”). BLURRED is over four minutes long. A few
27 seconds of vocal melody with only a fraction of its notes in common, or 3 out of 25
28 notes in a bass part playing the root at the same time, or a particular vocal section

1 that starts at the same measure—even if considered as a “constellation” of
2 similarities—is not substantial extrinsic similarity. If it were, the extrinsic test
3 would be meaningless, as virtually any two songs will have a few disparate notes in
4 common. The Court should grant JMOL or order a new trial.

5 **B. The Verdict Is Not Supported By Legally Sufficient Evidence Of**
6 **Substantial Intrinsic Similarity**

7 There is likewise insufficient evidence of substantial “intrinsic” similarities
8 between BLURRED and GIVE to support the jury’s finding of infringement.

9 The intrinsic test here turns on whether a reasonable observer would conclude
10 that the “total concept and feel” of the parties’ works are substantially similar based
11 on the protectable extrinsic elements of GIVE discussed above. To conduct this
12 test, the jury would have to compare BLURRED (Ex. 529) to the Deposit Copy of
13 GIVE. The only admissible evidence of what the Deposit Copy sounds like is Ms.
14 Wilbur’s recording of GIVE in Exhibit 141. A comparison of Exhibits 529 and 141
15 shows that these works are not remotely similar. They are different songs, with
16 different lyrics, melodies, musical parts, chord patterns (harmony), and structures.

17 While no reasonable juror could have found substantial intrinsic similarity,
18 the jury here never even conducted the intrinsic test. The jury was not instructed on
19 the intrinsic test until after the close of evidence. Hence, during trial, the jury had
20 no idea what it would be asked to do with the music it heard. In deliberations, the
21 jury never asked to hear any music, despite being told it could upon request. (*See*
22 *generally* Dkt. 313-338, 339.) The jury had been led to believe, based on the
23 prejudicial evidence and erroneous jury instructions, that it could find infringement
24 simply if it determined that Williams and Thicke sought to emulate the ideas
25 (“groove” or “feel”) of Marvin Gaye’s work, even if “subconsciously.” The jury
26 likely also was misled and confused by the Court’s repeated instructions that what
27 mattered was the experts’ opinions—not the music it had heard. (Dkt. 336, 51:6-
28 52:22, 70:24-71:25, 73:5-15.) For the intrinsic test, that is contrary to law.

1 The songs are not remotely similar based on their “total concept and feel.”
2 Judgment as a matter of law or a new trial should be granted for this reason too.

3 **IV. THE EVIDENCE DOES NOT SUPPORT THE DAMAGES AWARDS**

4 The jury awarded actual damages of \$4 million and infringer’s profits of
5 \$1,768,191.88 against Thicke and \$1,610,455.31 against Williams. The damages
6 awards are not supported by evidence, and thus JMOL or a new trial is warranted.

7 **A. The Jury’s Actual Damages Award Is Not Supported By Evidence**

8 The jury’s award of \$4 million in actual damages is grossly excessive and not
9 supported by any admissible evidence.

10 **1. Ms. Stern’s Testimony Should Have Been Excluded**

11 The sole evidence of actual damages was Ms. Stern’s testimony about a
12 hypothetical lost license fee. In conducting a hypothetical license evaluation, an
13 expert must link any proposed license rate “to the relevant facts and circumstances
14 of the particular case at issue and the hypothetical negotiations that would have
15 taken place in light of those facts and circumstances at the relevant time.” *Uniloc*
16 *USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1318 (Fed. Cir. 2011). The failure to
17 conduct such analysis renders the expert testimony “arbitrary, unreliable, and
18 irrelevant,” such that it “fails to pass muster under Daubert and taints the jury’s
19 damages calculation,” requiring a new trial. *Id.*; *see also McGlinchy v. Shell Chem.*
20 *Co.*, 845 F.2d 802, 806-07 (9th Cir. 1988). Importantly, a negotiation “must be
21 hypothesized as of the time infringement began,” so that the license fee is based on
22 “sales expectations at the time when infringement begins, ... as opposed to an after-
23 the-fact counting of actual sales.” *Interactive Pictures Corp. v. Infinite Pictures,*
24 *Inc.*, 274 F.3d 1371, 1384-85 (Fed. Cir. 2001); *see Oracle Corp. v. SAP AG*, 765
25 F.3d 1081, 1087 (9th Cir. 2014) (applying standard in copyright case).

26 Here, Ms. Stern did not conduct any analysis at all regarding a hypothetical
27 licensing negotiation. Instead, she briefly listened to the two songs and concluded
28 (based on her lay opinion of similarity) that the Gayes would have requested 50% of

1 the publishing revenues from BLURRED if a license had been sought before the
2 release of BLURRED and 75% to 100% after the release. (Dkt. 351, 27:18-28:22.)
3 Her opinions were unreliable and should have been excluded for several reasons.

4 *First*, “the touchstone for hypothetical-license damages is ‘the range of [the
5 license’s] reasonable market value.’” *Oracle Corp*, 765 F.3d at 1088. Ms. Stern
6 made no attempt at all to identify the “reasonable market value” for the portions of
7 GIVE in BLURRED. Her opinion should have been excluded for this reason alone.

8 *Second*, as discussed above, Ms. Stern’s opinion about the copying of GIVE
9 in BLURRED is unreliable because she is not a musicologist, and was precluded by
10 the Court from opining to the infringement of GIVE in BLURRED (*i.e.*, how much
11 of GIVE is in BLURRED), and her opinion improperly was based on the Sound
12 Recording and Ms. Finell’s edited recordings that have elements such as keyboard
13 and Theme X that are not in the Deposit Copy. (Dkt. 351, 25:20-28:15; 36:5-37:14.)

14 *Third*, and significantly, Ms. Stern’s licensing opinions were neither relevant
15 nor reliable because they were premised on her estimation of a license fee that
16 would have resulted *after* BLURRED’s release—*i.e.*, post-infringement. Ms. Stern
17 testified in support of her excessive (75% to 100%) license fee opinions that after
18 the release of a song, “it becomes an infringement issue. So you lose your
19 negotiation power.” (Dkt. 351, 24:24-25:1). But the damages issue is not what an
20 infringer might pay if caught red-handed (an issue on which she could not opine,
21 anyway). The issue is a negotiated fair market fee. *Oracle Corp*, 765 F.3d at 1088.

22 Ms. Stern’s testimony should have been excluded entirely. Because Ms.
23 Stern’s inadmissible testimony was the only evidence of damages, the damages
24 award was entirely unsupported by evidence.

25 **2. Even In Consideration Of Ms. Stern’s Testimony, the Actual**
26 **Damages Award Is Unsupported By Evidence**

27 Even if Ms. Stern’s actual damages opinions were properly admitted, the
28 jury’s award of \$4 million is grossly excessive and not supported by evidence.

1 The parties stipulated that Counter-Defendants’ total publishing revenues
2 from BLURRED were \$5,697,693. (Tr. Exh. 1766, 2:6-7, 9-10.) Ms. Stern testified
3 that the industry standard for negotiating the percentage of a new composition that
4 the owner of an older composition should receive for its use in the new song is to
5 allocate 50% of the copyright (*i.e.*, publishing revenue) to lyrics and 50% to music,
6 and to negotiate from there. (Dkt. 351, 22:7-18.) Even though Ms. Stern
7 acknowledged that the lyrics of BLURRED did not infringe (Dkt. 351, 32:4-33:11),
8 she nonetheless concluded that the Gayes would have asked for 50% of the revenues
9 from BLURRED had a license been sought prior to the release of BLURRED, and
10 75% to 100% of the revenues if the negotiation was after BLURRED’s release.
11 (Dkt. 351, 27:18-28:22.) Since 50% of the copyright is the music and there were no
12 lyrical similarities here, Ms. Stern effectively opined that 100% of the music (50%
13 of the copyright) in BLURRED came from GIVE—a claim wholly at odds with the
14 musicology evidence (discussed above). Yet the jury awarded \$4 million in
15 damages, which amounts to an approximate 70% licensing fee.

16 Even under Ms. Stern’s own analysis, the jury’s award of \$4 million in actual
17 damages is excessive for a song that has no lyrical similarities with GIVE and, at
18 most, has only fragmented musical similarities (*e.g.*, a so-called Signature Phrase
19 and hook from GIVE that appear only twice for six seconds total in BLURRED).
20 The award also is excessive (and, as noted above, contrary to law), because it
21 approximates Ms. Stern’s estimation of a license fee that would have resulted from a
22 hypothetical negotiation occurring *after* BLURRED’s release, when Counter-
23 Defendants would have “lost their negotiation power.” Furthermore, the award is
24 speculative because it is not based on any evidence of any previous license for
25 GIVE or about the value of GIVE itself, because Ms. Stern did not offer any such
26 evidence, or any evidence of any prior license of any other Marvin Gaye song, or
27 any R&B song, or any license at all. (*See* Dkt. 351, 17:12 -39:2); *see Oracle*, 765
28

1 F.3d at 1093 (“Oracle failed to provide sufficient objective evidence of the market
2 value of the hypothetical license underpinning the jury’s damages award”).

3 There is thus no admissible evidence of the Gayes’ actual damages, let alone
4 any evidence that supports an award of 70% of the publishing revenues of
5 BLURRED. The Court should enter JMOL or a new trial on actual damages.

6 **B. The Jury’s Profits Awards Are Not Supported By Evidence**

7 The jury’s awards of \$1,768,191.88 in profits against Thicke and
8 \$1,610,455.31 against Williams—200% of his stipulated profits!—also are
9 unsupported by any evidence.

10 To avoid impermissible double-counting of damages between actual damages
11 and profits, the Court instructed the jury that, in calculating actual damages, it
12 should take into consideration the “approximately \$8 million” in publishing revenue
13 received by the writers of BLURRED, but that in awarding profits, the jury “should
14 not take into consideration the same \$8 million.” (Dkt. 314 at 2.)⁵ The parties
15 stipulated that Williams’ non-publishing profits were \$860,333 and Thicke’s non-
16 publishing profits were \$4,253,645. As a matter of law, however, the jury’s awards
17 or profits had to be limited to “any profits of the defendant attributable to the
18 infringer.” (Dkt. 322 at 41 (Instruction No. 38); Dkt. 314 at 2.)

19 Here, the maximum profits attributable to infringement were low. At most,
20 and even assuming the admissibility of the Gayes’ expert musicology testimony,
21 only a small portion of the copyrighted musical expression of GIVE appears in
22 BLURRED. Moreover, the evidence shows that the financial success of BLURRED
23 is attributable in large part to factors that have nothing to do with any elements of
24 GIVE that may have been used in BLURRED—including, primarily, the music
25 video that went viral, the performances, promotional appearances, product tie-ins,
26

27 ⁵ The Court’s reference to “approximately \$8 million” was grossly inaccurate;
28 the stipulated amount of publishing revenue was \$6,377,055 for all three writers
(Thicke, Williams, and Harris). (Tr. Exh. 1766, 2:3-12.)

1 the performers, the massive financial investment in marketing and promotion, the
2 “star power” of the performers, and Williams’ production. (Dkt. 352, 85:3-102:13;
3 Dkt. 338, 27:11-51:20; Tr. Exhs. 52, 55, 58, 126, 128-131, 293, 458, 1003.)

4 As to the music itself, Ms. Wilbur testified that the elements of GIVE claimed
5 to have been copied amount to less than 5% of the BLURRED composition. (Dkt.
6 337, 16:21-17:13.) In addition, the sound recording elements of BLURRED, which
7 are protected by a separate copyright, as Ms. Stern admitted, were not at issue. Ms.
8 Stern testified that her opinion as to a license fee was strictly for a portion of the
9 BLURRED composition, and that the Gayes would have received zero percent of
10 the copyright in the BLURRED sound recording. (Dkt. 351, 31:4-32:1.) Given the
11 two copyrights in the BLURRED recording, and that no more than half of its
12 success is attributable to the composition (Dkt. 338, 32:21-34:23), and given that the
13 composition copyright is typically attributed half to the lyrics (*id.*), the profits
14 attributable to the infringement could not possibly approach what the jury awarded.

15 There was no contrary evidence at trial on these apportionment issues.
16 Nonetheless, the jury awarded 200% of Williams’ profits and 41.6% of Thicke’s.
17 (Dkt. 320, 2:18; Tr. Exh. 1766, 2:6.) These percentages clearly are contrary to the
18 facts and law because they are not the same—whatever the percentage of earnings
19 from BLURRED attributable to the copying of GIVE, that percentage has to be the
20 same for both Thicke and Williams. The inconsistent percentages here reflect a
21 verdict based on who the jury disliked most and not on the jury instructions. There
22 is a complete absence of evidence that would support an “apportionment” of 200%
23 of Williams’ profits and 41.6% of Thicke’s earnings. Moreover, the profit awards
24 also are grossly excessive. GIVE earned only half a million dollars in the five-year
25 period from 2009 to 2013. (Tr. Exhs. 254, 1765.) Yet the jury attributed more than
26 \$3 million in BLURRED profits to the few fragments of vocal or bass melodies
27 supposedly similar to GIVE. These awards are excessive and unsupported.

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2015, I electronically filed the foregoing **CORRECTED NOTICE OF MOTION AND MOTION OF PHARRELL WILLIAMS, ROBIN THICKE AND MORE WATER FROM NAZARETH PUBLISHING, INC. FOR JUDGMENT AS A MATTER OF LAW, DECLARATORY RELIEF, A NEW TRIAL, OR REMITTITUR; MEMORANDUM OF POINTS AND AUTHORITIES** with the Clerk of the Court by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.



Dina Webb